(2) 83-1830

Office - Supreme Court, U.S.
FILED
JUN 11 1984
ALEXANDER L. STEVAS,
CLERK

No. 83-3156

In The
Supreme Court of the United States
October Term, 1983

WILLIE L. LEWIS,

Petitioner,

vs.

HILLSBOROUGH TRANSIT AUTHORITY,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

ALBERT M. GUEMMER
CARSON, GUEMMER AND NICHOLSON
3002 West Kennedy Boulevard
Tampa, Florida 33609
Attorney for Respondent

COCKLE LAW BRIEF PRINTING CO., (800) 835-7427 Ext. 333

BEST AVAILABLE COPY

18pp

COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

Respondent submits that this case is not a proper case for certiorari, and would respectfully re-phrase the questions presented for review as follows:

(1) Should certiorari be granted to review a decision of the Eleventh Circuit Court of Appeals where that court has correctly followed this Court's decisions in the cases of *Parratt v. Taylor,* 451 U.S. 527 (1981) and *Ingraham v. Wright,* 430 U.S. 651 (1977)?

(2) Should this Court grant certiorari when the Petitioner has failed to demonstrate any factual or legal basis for his claim that the Eleventh Circuit Court of Appeals failed to adhere to this Court's decision in the case of *Erie Railroad Company v. Tompkins,* 304 U.S. 64 (1939)?

LIST OF PARTIES TO THE PROCEEDING

The parties to this proceeding in the United States Court of Appeals for the Eleventh Circuit were as follows:

Willie L. Lewis ..... Appellant

Hillsborough Transit Authority ..... Appellee

TABLE OF CONTENTS

	Pages
Counterstatement of the Questions Presented	i
List of Parties to the Proceeding	ii
Table of Contents	iii
Table of Authorities	iii
Reference to Report of Opinions	1
Jurisdictional Grounds	2
Statement of the Case	2
Statement of the Facts	2
Reasons For Denying the Petition:	
1. Petitioner is not entitled to review by certiorari since the Eleventh Circuit correctly rejected Petitioner's claim that he has been improperly required to exhaust his administrative remedies prior to bringing his Section 1983 action based upon this Court's decisions in *Parratt v. Taylor,* 451 U.S. 527 (1981) and *Ingraham v. Wright,* 430 U.S. 651 (1977)	5
2. Certiorari should be denied because Petitioner has shown no factual or legal basis for his claim that the Eleventh Circuit failed to follow this Court's decision in *Erie Railroad Company v. Tompkins,* 304 U.S. 64 (1939)	10
Conclusion	13

TABLE OF AUTHORITIES

Cases:	Pages
Albert v. Reddig, 718 F.2d 245 (7th Cir. 1983)	9
Brown v. Brenen, 722 F.2d 360 (7th Cir. 1983)	9
Ellis v. Hamilton, 669 F.2d 510 (7th Cir. 1982)	9

TABLE OF AUTHORITIES—Continued

Pages

Erie Railroad Company v. Tompkins, 304 U.S. 64 (1939) 10, 12

Flower Cab Company v. Petitte, 685 F.2d 192 (7th Cir. 1982) 9

Hadley v. Department of Administration, 411 So.2d 184 (Fla. 1982) 10

Ingraham v. Wright, 430 U.S. 651 (1977) 5, 9, 10

Monroe v. Pape, 365 U.S. 167 (1961) 6, 10

Parratt v. Taylor, 451 U.S. 527 (1981) 5, 9, 10

Patsy v. Board of Regents of the State of Florida, 457 U.S. 496 (1982) 6, 10

Other Authorities:

Fourteenth Amendment, United States Constitution 6, 9

Article 3, Section 14, Florida Constitution 11

Florida Statutes Section 447.401 ..... 10, 11, 12

Florida Statutes Section 163.545 11

Florida Statutes, Chapter 110 11

No. 83-3156

In The
Supreme Court of the United States
October Term, 1983

WILLIE L. LEWIS,

Petitioner,

vs.

HILLSBOROUGH TRANSIT AUTHORITY,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

REFERENCE TO REPORT OF OPINIONS

The opinions of the United States Court of Appeals for the Eleventh Circuit and of the District Court are cited in Petitioner's brief and copies of the pertinent opinions are included in the appendix to Petitioner's brief.

JURISDICTIONAL GROUNDS

Although Respondent submits that this is not a proper case for the granting of certiorari, it does not contest the jurisdictional basis posited by Petitioner.

STATEMENT OF THE CASE

Respondent adopts as its statement of the case the Statement Of The Case contained in the Petitioner's brief.

STATEMENT OF THE FACTS

The Respondent, Hillsborough Transit Authority, essentially agrees with the Petitioner's Statement Of The Facts, but Respondent respectfully wishes to point out the following additions and corrections:

On the day following the June 11, 1981 accident, a safety and training instructor from HTA contacted Mr. Lewis. (Tr. 90) There is no evidence in the record that HTA's employee was advised by Mr. Lewis that he was "still sore and unable to return to work." *See,* Petition at page 7.

Prior to the subject accident, the Petitioner had been injured on the job with HTA in similar motor vehicle accidents. As a result of his prior accidents, Petitioner came under the care of Dr. Angelo Alves. (R. 107)

HTA did not receive copies of the reports of Dr. Eckart or Dr. Alves. (R. 119) The Petitioner did not provide to HTA a copy of the 30-day disability note given to him by Dr. Alves. (Tr. 48)

Petitioner freely admits that he failed to contact his employer, HTA, after the accident, to let the Respondent know that he could not appear for work. (Tr. 47-48) On previous occasions, when he had been injured on the job, he had brought his disability note from his treating doctor to his employer. (Tr. 47-48)

There is no evidence in the record that the Petitioner was disabled from work from the accident date through July 2, 1981, when he saw Dr. Eckart and Dr. Alves.

Petitioner twice went to the HTA offices to fill out some forms and he spoke to several HTA employees, but never gave a reason for his absence from the job. (Tr. 39-40)

Upon receipt of the workers compensation form indicating that the Petitioner could return to work on July 3, 1981, Mr. Joseph Moffitt, manager of safety and training for HTA, recommended to his supervisors that Petitioner's employment be terminated pursuant to Article 7.4 of the collective bargaining agreement. (Tr. 95-96) Article 7.4 provided that an employee who was absent without leave could be considered as "resigned without notice." (Tr. 29) Management of HTA approved Mr. Moffitt's recommendation and on July 27, 1981, he sent a letter to Petitioner informing him that he was considered to have voluntarily resigned from his employment effective immediately. (Tr. 95)

Petitioner further testified at trial that, after his voluntary resignation, he spoke with the union president of Local 1464 on several occasions (no specific dates mentioned). Finally, the union president told him that there was "nothing he could do because I had already obtained an attorney." At no time, did the Petitioner request that a union grievance be filed on his behalf or did he file one on his own behalf. (Tr. 54-55)

There is conflicting evidence in the record on the issue of whether the Civil Service appeal procedures were applicable to the Petitioner at the time of his voluntary resignation. The only evidence presented by the parties at trial indicates that the Civil Service appeal procedures were not available to Petitioner at that time. (Tr. 31)

The only contrary evidence was an Affidavit of Mr. James Coleman, Director of Personnel for the City of Tampa, which Petitioner submitted with his Motion For New Trial, that indicated that Civil Service remedies may have applied to the Petitioner. (R. 153-154)

Furthermore, there is no evidence on the record to show that the Petitioner's attorney's letter of August 3, 1981, in which he requests an administrative hearing on behalf of the Petitioner, was a proper method for triggering the Civil Service review procedures.

Prior to March 1, 1980, the City of Tampa operated the bus system and entered into a collective bargaining agreement with Amalgamated Transit Union Local 1464, effective from December 2, 1979 through September 30, 1981. (Tr. 38) The chairman of the HTA, Mr. Charles M. Banks, and its executive administrator, Mr. Harry F. Orr, both testified that HTA continued to abide by the union

contract after HTA succeeded to the interest of the City of Tampa on March 1, 1980. (Tr. 21-23; 25-34) No contrary evidence was presented by Petitioner at trial.

The union grievance procedure under Article 6 of the collective bargaining agreement is initiated by the employee when he files his signed written grievance with his immediate supervisor within 5 working days after the date on which the employee knew or should have known of the action giving rise to the grievance. An unsatisfied employee may appeal to the Division Head, then to the Department Director, and finally to the Director of Employment Relations. The appeal procedure finally culminates in binding arbitration. (A. 5-8)

Although the Petitioner showed at trial that no Director of Employee Relations existed at the time of his voluntary resignation, the uncontroverted evidence also shows that union grievances were being filed and processed without problems at that time. (Tr. 113)

REASONS FOR DENYING THE PETITION

1. Petitioner is not entitled to review by certiorari since the Eleventh Circuit correctly rejected Petitioner's claim that he has been improperly required to exhaust his administrative remedies prior to bringing his Section 1983 action based upon this Court's decisions in Parratt v. Taylor, 451 U.S. 527 (1981) and Ingraham v. Wright, 430 U.S. 651 (1977).

The Petitioner attempts in his Petition for Certiorari to re-argue the merits of his appeal to the Eleventh Cir-

cuit Court of Appeals. It should be noted that Petitioner did not submit this issue for the Eleventh Circuit's consideration until he filed his Petition For Rehearing En Banc.

On the merits of his Petition, the Petitioner argues that the Eleventh Circuit's decision conflicts with *Monroe v. Pape,* 365 U.S. 167 (1961) and *Patsy v. Board of Regents of the State of Florida,* 457 U.S. 496 (1982), because the Eleventh Circuit has allegedly required him to exhaust his state law remedies prior to bringing a Section 1983 action in federal court.

In denying the Petitioner's Motion For Rehearing En Banc, the Eleventh Circuit noted that its ruling did not require the Petitioner to exhaust his state law remedies. Instead, the Petitioner's claim was decided by the court on the merits of his constitutional claim, i.e., that he had failed to show a denial of due process under the Fourteenth Amendment.

Specifically, the Eleventh Circuit found that the administrative remedies available to the Petitioner (union grievance procedures and City of Tampa Civil Service regulations) provided him with all of the due process due to him under the Fourteenth Amendment. Thus, the Petitioner's claim was rejected on the merits for failure to allege a constitutional violation.

The grievance procedures under the collective bargaining agreement between Respondent and Union Local 1464 provided the Petitioner with an effective opportunity to respond to the reasons for his voluntary termination, but he failed to avail himself of that opportunity. Petitioner argues that this grievance procedure was unavail-

able to him following his resignation for two reasons: (a) He was allegedly told by the union president that the union could not help him because he had an attorney; and (b) irregularities allegedly existed in the grievance process due to unfilled supervisory positions.

Factually, the Petitioner's first argument cannot be supported in the record. Petitioner testified at trial that on several unspecified occasions he spoke with the union president. He allegedly was ultimately advised that there was nothing the union president could do for him because he had already obtained an attorney. Clearly, these conversations occurred after Petitioner was well into the legal processes with his attorney and after the time had expired for him to file a union grievance (at which point in time the union president could not, in fact, do anything for him). (Tr. 55)

Also, Petitioner did not require anyone's assistance to initiate the grievance since all an employee must do is file a signed written grievance with his immediate supervisor within 5 working days of management's action. Thus, Petitioner's argument concerning his receiving no assistance from the union is irrelevant.

The record does not support Petitioner's second contention that the grievance procedure "was in a state of disarray" at the time of his voluntary resignation. *See,* Petition at page 16. The only person who testified on this issue at trial, Mr. Joseph Moffitt, testified that union grievances were being processed without any problems at the time of Petitioner's resignation, even though no person was formally designated as the Director of Employee Relations. (Tr. 110; 113)

Regardless of Petitioner's arguments as to the alleged irregularities of the grievance procedures, he has no standing to complain at this late date because of any alleged problems for two reasons: (1) He failed to take the initial step of filing a written grievance; and (2) there is no evidence in the record that the Petitioner failed to pursue a union grievance due to the alleged problems.

Petitioner's failure to pursue his grievance remedies is compounded by his failure to properly pursue his Civil Service remedies (assuming he was eligible to do so).[1] There is no evidence in the record that the Petitioner's attorney's letter of August 3, 1981 was a proper vehicle for invoking a Civil Service administrative review of his voluntary resignation or that the Petitioner or his attorney made the proper demand for such a hearing with the Civil Service Board.[2]

Thus, there is no evidence to support Petitioner's assertion that his request for a Civil Service administrative hearing was denied. *See,* Petition at page 13. The only evidence before this Court is that the Petitioner failed to

---

[1]HTA's executive administrator, Mr. Harry Orr, clearly testified at trial that the only appeal process open to Mr. Lewis at the time of his voluntary resignation was the grievance procedure. (Tr. 31) Not until he submitted an Affidavit with his Motion for Rehearing in the District Court, did the Petitioner present any evidence that he was covered both by the union grievance procedure and Civil Service. (R. 153-154)

[2]Likewise, there is no evidence that Mr. Moffitt's refusal to initiate an administrative hearing was a final decision on that request or that he was the proper person to make such a denial. Petitioner's statement at page 13 of his Petition to the effect that Mr. Moffitt testified that "just about anything" would trigger the Civil Service machinery is incorrect. Mr. Moffitt clearly was referring to the union grievance procedures, not Civil Service. (Tr. 102-105)

utilize the Civil Service remedies at hand, as he had failed to utilize the union grievance process available to him.

As the District Court noted in its written opinion herein, the grievance and Civil Service remedies that were available to Petitioner, but which he failed to utilize, placed "due process at (Petitioner's) disposal." *See*, Petition at page 43. If any deprivation of due process occurred, Petitioner has only himself to blame for his own inaction.

The Eleventh Circuit expressly rejected Petitioner's claim that he has been improperly required to exhaust his administrative remedies prior to bringing his Section 1983 action. In rejecting Petitioner's claims, the Eleventh Circuit primarily relied upon this Court's decisions in the cases of *Parratt v. Taylor*, 451 U.S. 527 (1981) and *Ingraham v. Wright*, 430 U.S. 651 (1977).

In *Parratt* and *Ingraham* this Court looked to the available State remedies to determine whether those procedures provided sufficient due process under the Fourteenth Amendment. These cases concerned the issue of whether there was a constitutional violation, not whether there was exhaustion. In each case, this Court did not dismiss for failure to exhaust State remedies, instead this Court held against each claimant on the merits of his constitutional claim because the available, yet unused, State remedies complied with due process.[3]

---

[3]*See also, Brown v. Brenen*, 722 F.2d 360 (7th Cir. 1983) in which the Seventh Circuit dismissed the constitutional claims of the County Sheriff's department employees against the County Sheriff and others for uncompensated overtime and other claims because the Plaintiffs also had available a breach of contract action under the laws of the State of Illinois. *See also, Albery v. Reddig*, 718 F.2d 245 (7th Cir. 1983); *Flower Cab Company v. Petitte*, 685 F.2d 192 (7th Cir. 1982); *Ellis v. Hamilton*, 669 F.2d 510 (7th Cir. 1982).

Petitioner has not contended that the review procedures applicable to him were unconstitutional. In fact, a Civil Service review procedure very similar to the one applicable to Petitioner herein was expressly held constitutional by the Supreme Court of Florida in the case of *Hadley v. Department of Administration,* 411 So.2d 184 (Fla. 1982).

Clearly, the Eleventh Circuit Court of Appeals has not in any manner violated this Court's decisions in *Monroe v. Pape* or *Patsy v. Board of Regents of the State of Florida.* Petitioner's constitutional claims were correctly reviewed and rejected on their merits by the District Court and Eleventh Circuit in line with the cases of *Parrett v. Taylor* and *Ingraham v. Wright.*

2. Certiorari should be denied because Petitioner has shown no factual or legal basis for his claim that the Eleventh Circuit failed to follow this Court's decision in Erie Railroad Company v. Tompkins, 304 U.S. 64 (1939).

Petitioner attempts to re-argue an issue that was expressly rejected by the Eleventh Circuit Court of Appeals. Again, this issue was not presented to the Eleventh Circuit until the Petitioner filed his Motion for Rehearing En Banc.

Petitioner contends that the Eleventh Circuit failed to apply the final sentence of Florida Statutes Section 447.401, which precludes a "Career Service" employee from utilizing both the Civil Service appeal and union grievance procedures for review of disciplinary action taken against him.

First, it is obvious that Petitioner's arguments must fail because the above-referenced Florida statutory provision is not applicable to him.

The final sentence of Florida Statutes Section 447.401 applies only to "Career Service" employees. A "Career Service" employee is an employee employed by the State of Florida under the Career Service System established by Chapter 110, Florida Statutes.

As an employee of Respondent, which is a mass transit authority created by the Florida Statutes, the Petitioner is not an employee of the State of Florida and, thus, he is not a "Career Service" employee.[4]

Instead, Petitioner is covered by the City of Tampa Civil Service Board, which is authorized by Article 3, Section 14 of the Florida Constitution.[5] Thus, Petitioner cannot show that he was barred from pursuing both his Civil Service and his union grievance remedies at the same time by Florida Statutes Section 447.401.

Assuming that Florida Statutes Section 447.401 applies to Petitioner, he has not shown that he had any less remedies available to him to review his voluntary resignation. There is no evidence in the record that Petitioner had properly invoked his right to a Civil Service review of his separation from his employment. That is, there is no evidence that Petitioner's attorney's letter of August 3, 1981 served to invoke an administrative review. In fact, the Civil Service rules indicate that the Petitioner must

---

[4]See, Florida Statutes Section 163.545.

[5]By law there may be created a Civil Service System for State employees, except those expressly exempted, and there may be created Civil Service systems and boards for County, District or Municipal employees, and for offices thereof as are not elected or appointed by the Governor, and there may be authorized such boards as are necessary to prescribe the qualifications, method of selection and tenure of such employees and officers.

himself make a written demand for review directly to the Civil Service Board. (A. 20)

Therefore, the Petitioner has not shown that he properly invoked an administrative review in order for Florida Statutes Section 447.401 to serve as a bar to a union grievance proceeding. What the Petitioner has demonstrated is that he had two remedies available to him under State law to review his voluntary resignation and that he failed to obtain that review. Consequently, the District Court observed in its written opinion herein, that due process was at Petitioner's disposal; any deprivation of due process resulted from his own inaction. *See,* Petition at page 43.

The Eleventh Circuit correctly ruled that Petitioner's argument, that under State law he had only one remedy available to him to review his voluntary resignation, rather than two, ignores the real issue. The fact remains that Petitioner did have at least one remedy available to him for review, which satisfies constitutional requirements. If Petitioner did have two remedies at his disposal, then that fact shows that he clearly was not deprived of any due process rights.

Petitioner has failed to show any conflict with this Court's decision in *Erie Railroad Company v. Tompkins.* The Eleventh Circuit Court of Appeals, in denying Petitioner's Motion For Rehearing En Banc, expressly held that there was no conflict. That decision was factually and legally correct and should be affirmed.

———o———

CONCLUSION

For the reasons stated above, it is respectfully submitted that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

ALBERT M. GUEMMER
CARSON, GUEMMER AND NICHOLSON
3002 W. Kennedy Boulevard
Tampa, Florida 33609

Attorney for Respondent